12-2402-10724-2

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF PEACE OFFICER STANDARDS AND TRAINING

In the Matter of the
Disciplinary Hearing Relating
to Michael Alan Kveene,
License No. 10639.

ORDER GRANTING PARTIAL SUMMARY DISPOSITION

The above-entitled matter came on for oral argument on October 17, 1996, at the Office of Administrative Hearings before Administrative Law Judge Steve M. Mihalchick. The argument was held on the Motion for Summary Disposition of the Complaint Investigation Committee (the Committee) for the Minnesota Board of Peace Officer Standards and Training (POST Board). The record on this motion closed at the end of the hearing on October 17, 1996.

Robert L. Richert, Collins, Buckley, Sauntry & Haugh, P.L.L.P., appeared on behalf of the Licensee, Michael Alan Kveene. David E. Flowers, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Committee.

NOW, THEREFORE, based upon all of the files, records, and proceedings herein, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED:

(1) That the Complaint Committee's Motion for Summary Disposition be GRANTED; and,

(2) That the hearing scheduled for December 11, 1996, will be limited to issues of what action, if any, the POST Board should take regarding Kveene's license based on his conviction for violating Minn. Stat. § 609.43.

Dated this 1st day of November, 1996.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Michael Alan Kveene was licensed by the POST Board as a peace officer on April 2, 1990. Laux Affidavit, at 4. His license lapsed on July 1, 1996, by virtue of Licensee's failure to renew the license. Licensee was employed by the St. Paul Police Department until October 14, 1994.

On May 17, 1994, Licensee was charged in Ramsey County District Court with two counts of gross misdemeanor misconduct of a public officer, in violation of Minn. Stat. § 609.43 and one count of misdemeanor lewd or lascivious conduct in violation of Minn. Stat. § 617.23. Committee Memorandum, Exhibit A. The criminal complaint alleged that the conduct occurred between July 1, 1992 and August 15 1992.

After a jury trial, Licensee was convicted of one count of misdemeanor misconduct of a public officer in violation of Minn. Stat. § 609.43 and one count of lewd and lascivious conduct in violation of Minn. Stat. §617.23 on September 27, 1994. Committee Memorandum, Exhibit B. On November 8, 1994, Judge Wilson of the Ramsey County District Court sentenced Licensee to 90 days in jail and a $700 fine, but stayed execution of that time and fine for one year conditioned on no same or similar offenses, no contact with the victim, continuing counseling, performing 40 hours of community service, and paying a fine of $140. Committee Memorandum, at Exhibit C.

. On September 7, 1993, the POST Board published in the Minnesota State Register proposed amendments to Minn. R. 6700.1600. 18 S.R. 755-67 (Sept. 7, 1993). One of the proposed amendments made conviction of violating Minn. Stat. § 609.43 a ground for discipline by the POST Board.

. On February 28, 1994, the POST Board published in the Minnesota State Register its Notice of Adoption of the amendments referred to above. 18 S.R. 1961 (Feb. 28, 1994). On that date the POST Board adopted the amendment making a conviction for violating Minn. Stat. § 609.43 grounds for discipline by the Board. Minn. R. 6700.1600 H.

On November 22, 1994, the Committee issued a complaint against Licensee that, based on his criminal conviction he was in violation of Minn. R. 6700.1600 H. Committee Memorandum, Exhibit E. On January 6, 1995, the Committee found reasonable grounds to believe that a violation within the POST Board's enforcement jurisdiction had occurred and ordered an administrative hearing to be held unless the matter could be resolved by stipulation. No agreement was reached between the Committee and the Licensee. On August 28, 1995, Licensee's attorney was served with the Notice and Order for Hearing setting a prehearing conference in this matter.

Summary disposition is the administrative equivalent of summary judgment under Rule 56.02 of the Minnesota Rules of Civil Procedure. The same standards apply. *See* Minn. R. 1400.5500 K (1991); Minn. R. Civ. P. 56.03. Summary

disposition of a claim is appropriate when there is no genuine issue as to any material fact and one party is entitled to a favorable decision as a matter of law. Minn. R. Civ. P. 56.03. A material fact is one which is substantial and will affect the result or outcome of the proceeding depending on the determination of that fact. Highland Chateau, Inc. v. Minnesota Dep't of Public Welfare, 356 N.W.2d 804 (Minn. App. 1984), *rev. denied*, (Minn. 1985). In considering a motion for summary disposition, the evidence must be viewed in the light most favorable to the non-moving party. Grondahl v .Bulluck, 318 N.W.2d 240 (Minn. 1982); Nord v. Herreid, 305 N.W.2d 337 (Minn. 1981).

With a motion for summary disposition, the initial burden is on the moving party to show facts establishing a *prima facie* case for the absence of material facts at issue. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a *prima facie* case, the burden shifts to the non-moving party. Minnesota Mutual Fire and Casualty Co. v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The non-moving party may not rely on general assertions; significant probative evidence must be offered. Minn. R.Civ. P. 56.05; Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1989); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The evidence introduced to defeat a summary disposition motion need not be admissible trial evidence, however. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).

Licensee argues that his failure to renew his license from the POST Board means the license has lapsed and the Committee lacks any authority to take action against that license. The Committee maintains that it does have authority to act and it should do so because there is a right to renew the license and there is a need to protect the public from bad conduct by licensees. Committee Reply Brief, at 2-3. These reasons to take adverse action against the license are characterized as "purely hypothetical" and "not justiciable" by the Licensee. Respondent's Reply Brief, at 3.

The Committee cites Disciplinary Action Against McCoy, 447 N.W.2d 887 (Minn. 1989), as standing for the proposition that licensing bodies are not required to accept relinquishment of a license in lieu of discipline. The Supreme Court stated:

> During the pendency of this disciplinary proceeding respondent submitted a petition for resignation which we denied. As we have previously noted, this court will not entertain petitions for resignation while disciplinary petitions alleging serious misconduct are pending. See In re Jones, 383 N.W.2d 303, 307 (Minn.1986). When a lawyer's flagrant violations of professional responsibilities justify disbarment, resignation will not be allowed. In re Johnson, 290 N.W.2d 604, 606 (Minn.1980); In re Hetland, 275 N.W.2d 582, 584-85 (Minn.1978). To permit a lawyer to resign when disbarment is clearly called for would

> not serve the ends of justice nor deter others from legal misconduct. Johnson, 290 N.W.2d at 585; In re Streater, 262 Minn. 538, 543-44, 115 N.W.2d 729, 733 (1962).

McCoy, 447 N.W.2d at 891

Protection of the public and deterring other licensees from misconduct are valid policy reasons for pursuing action against a license that has already lapsed. There is no valid public policy advanced when a licensee can control the disciplinary process by allowing a license to lapse. *See* Gilpin v. Board of Nursing, 837 P.2d 1342 (Mont. 1992), Wang v. Board of Registration in Medicine, 537 N.E.2d 1216 (Mass. 1989); Louisiana State Bar Association v. Powell, 195 So.2d 280 (La. 1967). The reasons for not allowing resignation to foreclose discipline support a finding of continued jurisdiction by the Board over the license at issue in this matter.

Minn. Stat. § 626.843 authorizes the POST Board to adopt rules regarding standards of conduct. Licensee argues that the POST Board lacks statutory authority to adopt a rule that renders a conviction the basis for discipline. For the purpose of justifying discipline, there is no meaningful distinction between conduct and a conviction for that conduct. The conviction is merely a demonstration of the proof of that conduct, at an evidentiary standard higher than the standard applied in administrative proceedings. Justifying discipline through specified criminal convictions is within the Board's statutory authority.

The conduct which supported Licensee's conviction occurred before the adoption of the rule making conviction for that conduct a basis for discipline. Licensee argues that the rule cannot be applied to that conduct without violating constitutional limitations. The application of Minn. R. 6700.1600 H to conduct prior to adoption of the rule was addressed in In the Matter of the Disciplinary Hearing Relating to Wayne Quiram, License No. 10639, OAH Docket No. 2-2402-9774-2 (Order issued August 31, 1995). The rule provides in relevant part:

> Violations of the following standards of conduct by a licensee shall be grounds for revocation, suspension, or nonrenewal of license:
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> * * *
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> H. any conviction of a violation of Minnesota Statutes, section . . . 609.43, . . . or a conviction in another state or federal jurisdiction which would be a violation of the cited statutes if it had been committed in Minnesota.

Minn. R. 6700.1600 H.

In Quiram, the application of the rule was asserted to violate due process and the prohibition against ex post facto prosecution in both the state and federal

constitutions. Regarding retrospective application in violation of due process, the Administrative Law Judge stated:

> The terms of the rule make a conviction of violating Minn. Stat. § 609.43 the basis for discipline by the POST Board. No other event triggers application of the rule, and by operation of law the rule became effective prior to Quiram's conviction. The Complaint Board argues in effect that the rule is not retrospective, because it applies to convictions taking place after the effective date of the rule. Cf. State v. Samarzia, 452 N.W.2d 727 (Minn. App. 1990), rev. denied, (Minn. Apr. 25, 1990) (sentencing statute applied to sentencing occurring after its effective date, even though offense occurred before then); State v. Larson, 393 N.W.2d 238 (Minn. App. 1986) (critical date under statute is date of sentencing, not date of offense; statute permitting docketing of civil restitution orders applied to sentencings occurring after effective date of statute).

Quiram, at 5.

The Judge also analyzed the claim that constitutional prohibitions against ex post facto law apply to such licensing actions. In that regard, the Judge stated:

> His argument with regard to the ex post facto clause is similarly misplaced. The constitutional prohibition against passage of ex post facto laws is limited to laws involving punishment for crimes, Starkweather v. Blair, 245 Minn. 371, 71 N.W.2d 869, 879-881 (1955), and accordingly is not applicable in civil proceedings. Quiram claims the ex post facto clause was applied in civil proceedings in State ex rel. Coduti v. Hauser, 291 Minn. 297, 17 N.W.2d 504 (1945); however, as the Supreme Court made clear in Starkweather, in that case the term was used generically and no constitutional issue was involved. See Starkweather, 71 N.W.2d at 881.
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> Even if the disciplinary rule is deemed to have some retrospective effect, and even assuming the ex post facto clause applied in this proceeding, there appears to be no reason, constitutional or otherwise, why the rule should not be applied to Quiram. The United States Supreme Court has viewed similar legislation not as a punitive measure, but rather as a valid regulatory measure well within the police power of the state. For example, in Hawker v. New York, 170 U.S. 189 (1898), the Court upheld the application of a statute that disqualified a physician from practicing medicine based on a criminal conviction that occurred fifteen years before the statute's effective date. In concluding that there was no constitutional violation, the Court stated that:
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> > [S]uch legislation is not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled, and naming

> what is deemed to be and what is in fact appropriate evidence of such qualification.

Id., 170 U.S. at 200.

Similarly, in DeVeau v. Braisted, 363 U.S. 144 (1960), the Court held that a statute disqualifying a union officer from employment, based on a criminal conviction that occurred thirty-six years prior to the effective date of the statute, did not violate the due process or ex post facto clauses. The Court reasoned that:

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession.

Id., 363 U.S. at 160.

As in Hawker and DeVeau, the rule at issue in this case is one that regulates the qualification for an occupation based in part on whether the individual has been convicted of a particular crime. Quiram has made no argument that the rule itself has no rational basis, nor could he do so successfully. Furthermore, the facts do not suggest that subjecting Quiram to discipline is a particularly harsh or oppressive result. He is, after all, a police officer; he was convicted of a gross misdemeanor before the disciplinary rule became effective; and he was certainly on notice before the conduct took place that he was subject to significant penalties. It is not fundamentally unfair in any constitutional sense to discipline a police officer for violating a law prohibiting misconduct of public employees.

Quiram, at 6-7.

There is no reason to require the Committee to demonstrate the fact of the Licensee's conviction. That fact is undisputed. Licensee is collaterally estopped from denying the underlying facts to the conviction. In the Matter of the Teaching License of Falgren, 545 N.W.2d 901, 905-06 (Minn. 1996). Applying the plain language of the rule, the POST Board is authorized to take disciplinary action based upon that conviction.

Licensee has argued that the POST Board should exercise its discretion, owing to the nature of the offense. In Falgren, the Minnesota Supreme Court has recently ruled on what issues must be addressed where collateral estoppel forecloses inquiry into the conduct on which the discipline is based. The Supreme Court stated:

> However, while collateral estoppel may be applicable to the nonconsensual sexual contact issue, this does not mean that the ALJ is precluded from hearing additional evidence concerning Falgren's license revocation. As Falgren points out, discharge from a teaching position in a specific school district is distinct from the loss of a license to teach in any district in the state. This is particularly so when the triggering event for either is as nebulous as engaging in "immoral conduct." Conduct which a particular community might find immoral may not be so labeled in another location in the state. Indeed, in In re Shelton, 408 N.W.2d 594 (Minn.App.1987), pet. for rev. denied (Minn. Aug. 12, 1987), a school board terminated a teacher for immoral conduct and conduct unbecoming a teacher when he embezzled funds from a corporation he and two other teachers in the district were running. Nonetheless, the court of appeals noted that "[f]aculty members testified relator is well qualified to teach in any other district." Id. at 598.
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> Moreover, section 125.09, subd. 1(1) provides that the Board may revoke a teacher's license if the teacher has engaged in immoral conduct; the legislature does not require that the teacher's license be revoked based on such a finding. Thus, we hold that even though collateral estoppel may be applied to the issue whether Falgren engaged in nonconsensual sexual contact with I.B., the ALJ must still consider any additional evidence the defendant may wish to present concerning the alleged immorality of his or her conduct and whether the ALJ should recommend revocation based exclusively on immoral conduct.
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> In the present case, Falgren wished to introduce evidence that he had participated in a program dealing with boundary laxness issues. He states that he would have introduced reports of counselors and psychologists that worked with him in that program. This evidence would be relevant to whether the ALJ should recommend revocation based exclusively on immoral conduct. Because Falgren's death moots this issue in his particular case, we need not remand. However, in the usual case, the ALJ would have to have admitted this evidence.

Falgren, 545 N.W.2d at 908.

Accordingly, the POST Board is acting within its authority to discipline Licensee under Minn. R. 1600.6700 for a conviction under Minn. Stat. § 609.43. Since there is no genuine issue of material fact, the Committee is entitled to summary disposition on the issue of discipline being appropriate. Genuine issues of material fact remain for hearing on what disciplinary action, if any, should be taken in response

to that conviction. Therefore, the hearing scheduled for December 11, 1996, will be held to allow evidenceon that issue to be presented.

S.M.M.